Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

NORTHERN ILLINOIS CHAPTER OF ASSOCIATED BUILDERS AND CONTRACTORS, INC. AND LOBERG EXCAVATING, INC.

Petitioners

v.

JACK LAVIN, in his official capacity as DIRECTOR OF THE ILLINOIS DEPARTMENT OF COMMERCE AND ECONOMIC OPPORTUNITY

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the National Labor Relations Act preempts a state law that compels private employers to enter into agreements with labor organizations as a condition of receiving state funds.

2. Whether the test for distinguishing between proprietary and regulatory state activity, for purposes of preemption analysis, should be that adopted by the Fifth, Ninth, and Second Circuits based upon this Court's holding in the *Boston Harbor* case, or the new and conflicting test adopted by the Seventh Circuit in the present case.

STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Petitioners Northern Illinois Chapter of Associated Builders and Contractors, Inc. and Loberg Excavating, Inc. are privately owned entities. They have no parent corporations and no publicly held company owns 10% or more of their stock.

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NORTHERN ILLINOIS CHAPTER OF ASSOCIATED BUILDERS AND CONTRACTORS, INC. AND LOBERG EXCAVATING, INC.,

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JACK LAVIN, DIRECTOR OF THE ILLINOIS DEPARTMENT OF COMMERCE AND ECONOMIC OPPORTUNITY,

Respondent.

On Petition For Writ Of Certiorari To The
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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The ruling of the United States Court of Appeals for the Seventh Circuit as to which the writ is being sought is reported as *Northern Illinois Chapter of Associated Builders and Contractors, Inc. v. Lavin*, 431 F. 3d 1004 (7th Cir. 2006). (App. 1a). A Petition for Rehearing filed with that court was denied on February 6, 2006. (*Id.* at 7a). The Court of Appeals' decision affirmed a decision of the U.S. District Court for the Northern District of Illinois, albeit on new grounds not relied on by the District Court. (*Id.* at 8a).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

Supremacy Clause of the United States Constitution, article 6, clause 2

National Labor Relations Act, 29 U.S.C. § 151, et seq., and more specifically §§ 157, 158(d), 158(e), and 158(f) (relevant excerpts reprinted at App. 18a).

Illinois Renewable Fuels Program Development Act, 20 I.C.S. § 689/1, et seq. (reprinted in its entirety at App. 12a).

STATEMENT OF THE CASE

At issue in the present case is the Illinois Renewable Fuels Program Development Act ("IRFPDA" or "the Act"), set forth at, 20 I.C.S. § 689/1, et seq. (App. 12a). This statute expresses the regulatory policy of the State of Illinois to force private entities to enter into agreements with labor organizations as a prerequisite to working on all renewable fuels projects subsidized by the State.

The IRFPDA provides up to fifteen million dollars in grants to entities constructing, modifying, altering, or retrofitting ethanol plants in Illinois. However, to be eligible for a grant under Act, recipients must "enter into a project labor agreement" (a "PLA") with a labor organization that must include the following:

> (1) provisions establishing the minimum hourly wage for each class of labor organization employee;
>
> (2) provisions establishing the benefits and other compensation or each class of labor organization employee; and
>
> (3) provisions establishing that no strike or disputes will be engaged in by the labor organization employees. The owner of the plant and the labor organizations shall have the authority to include other terms and conditions as they deem necessary.

20 ILCS §689/15(a)(3) and 25(a).

As the Seventh Circuit found, the State has no proprietary interest in the proposed fuel plants, which are to be privately owned and operated. (App. 2a). The new labor mandate also bears no relationship to the sole state interest set forth in the legislation's "Findings and State Policy," i.e., "to promote and encourage the production and use of renewable fuels as a means ... to improve air quality ... [and] to grow the agricultural sector of the Illinois economy." (App. 12a). Nothing in the statute limits the mandated project labor agreements to construction workers or to the site of construction of fuel plants. In addition, the mandated labor agreements are not confined to grantees who are employers in the construction industry, as would be required for such "pre-hire" agreements to be lawful under

Sections 8 (d), (e) and (f) of the NLRA.[1]

On August 27, 2004, the Northern Illinois Chapter of the Associated Builders & Contractors, Inc. ("ABC") and Loberg Excavating, Inc. ("Loberg") filed a declaratory judgment action seeking a declaration that Sections 15 and 25 of the IFRPDA are preempted by the National Labor Relations Act by virtue of the Supremacy Clause of the United States Constitution.

More specifically, ABC contended that the challenged provisions are preempted under the holdings of *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 3 L.Ed.2d 775, 79 S. Ct. 773 (1959) and *Wisconsin Dept. of Ind., Labor and Human Relations v. Gould*, 475 U.S. 282 (1986), because they condition access to state funds on grantees' agreeing to submit to a scheme of labor relations different from the National Labor Relations Act, including the imposition of actual contract terms intruding upon Section 7 and 8 rights of private employees and employers. ABC further argued that the statute's provisions are preempted under *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 150 (1976), in that they interfere with the private balance of labor relations intended

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[1] Section 8(d) of the NLRA states that no party to collective bargaining can be required to agree to a proposal. Section 8(e) prohibits employers from entering into agreements with labor unions that compel other employers to bargain with such unions. Section 8(f) prohibits employers from bargaining or reaching agreements with unions that do not first demonstrate that they represent the majority of the employer's employees. Sections 8(e) and 8(f) create exemptions from these general rules solely for "employers in the construction industry," a term that has been narrowly defined by the NLRB. *See Columbus Bldg. & Const. Trades Council (Kroger Co.)*, 149 NLRB 1224, 1225-6 (1964) and subsequent cases. Each of the above-referenced statutory provisions is reprinted in the Appendix to this Petition. (App. 18a).

to be left unregulated by the NLRA. Applying principles established by this Court in *Building & Construction Trades Council v. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc.* 507 U.S. 218, 226-27 (1993) ("*Boston Harbor*"), ABC demonstrated that the state had not acted as a "market participant" in a manner narrowly tailored to a proprietary interest and in the same manner as a similarly situated private actor could act.

On March 24, 2005, the District Court ruled in favor of the State on cross motions for summary judgment, finding that Illinois was acting as a proprietor/market participant when it enacted Sections 15 & 25, within the meaning of *Boston Harbor*. (App. 12a). ABC appealed to the Seventh Circuit.

On December 9, 2005 the Court of Appeals affirmed the District Court's grant of summary judgment, but on grounds not advanced by either the District Court or by any of the parties to the appeal. (App. 1a). At the outset, the Court of Appeals opinion rejected the District Court's conclusion (and the State's contention) that Illinois was acting in a proprietary capacity when it enacted the IRFPDA. (*Id.* at 2a). As the appeals court observed:

> The problem with this view is that the state is not the proprietor *of* anything. It does not own any renewable-fuels project, either before or after granting a subsidy. The project's owner, not the state, is its proprietor. Boston hired the general contractors for the project; Illinois does not hire contractors. Nor does it invest in the projects through bonds.

The Seventh Circuit further found that the state "likely" enacted the law because "state officials want to assist organized labor." (*Id.* at 5a). The Court of Appeals

nevertheless determined that Sections 15 and 25 were not regulatory acts and were not preempted by the NLRA.

In order to reach this result, the appeals court relied almost entirely on cases construing federal grants to state governments, particularly *Rust v. Sullivan*, 500 U.S. 173 (1991), and *South Dakota v. Dole*, 483 U.S. 203 (1987). (App. 3a-5a). The Seventh Circuit misinterpreted these cases as establishing a general principle that conditions on government subsidies are not "forbidden regulation," at least so long as such conditions do not "affect conduct other than the financed project." (*Id.* at 5a). From this erroneous premise, the Court of Appeals proceeded to find that *Boston Harbor's* carefully elaborated market participant doctrine was "just one illustration of the proposition that states may act in commerce without regulating commerce. The situation in this litigation is another illustration." (*Id.* at 4a-5a).

The Seventh Circuit did not acknowledge the Fifth Circuit's conflicting decision in *Cardinal Towing v. & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686, 693 (5th Cir. 1999), or the numerous decisions in other circuits that have relied on the *Cardinal Towing* test for distinguishing between proprietary and regulatory activity:

> First, does the challenged action essentially reflect the entity's own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances? Second, does the narrow scope of the challenged action defeat an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem?

Cited with approval in Olympic Pipe Line Co. v. City of Seattle, 437 F. 3d 872, 881 (9th Cir. 2005); and *Sprint Spectrum L.P. d/b/a Sprint PCS v. Mills*, 283 F. 3d 404 (2d Cir. 2002); *see also Healthcare Ass'n of New York State, Inc. v. Pataki*, 388 F. Supp. 2d 6, 23 (N.D. NY 2005), *appeal pending* (2d Cir.).

In the present case, the appeals court made neither of the findings set forth above, as called for by *Cardinal Towing* and by *Boston Harbor* itself. Instead, the Seventh Circuit declared that as long as a state law is "project specific," even though applying on its face to *multiple* projects and even in the absence of any state proprietary interest in such projects, the state is free to "assist organized labor" by compelling private grant recipients to enter into union agreements.

A petition for rehearing was denied by the Court of Appeals on February 18, 2006.

REASONS FOR ALLOWING THE WRIT

I. This Court's Review Is Required To Resolve A Conflict Among Federal Courts As To Whether The NLRA Preempts A State Law Forcing Private Employers To Enter Into Labor Agreeements on State-Subsidized Projects, Where The State Is Not Acting As Market Participant.

By creating a new and unprecedented exemption from NLRA preemption for state laws beyond the previously limited scope of market participation, the Court of Appeals Opinion threatens to undermine the Supremacy Clause and the federal role in protecting the rights of private employers and employees. State and local governments spend many billions of dollars annually throughout the country on

business development incentive programs. *See* Lockie, *Economic Development Incentive Wars*, www.cba.uni.edu9economics (2004); *see also* Corporation for Enterprise Development, *Ten Questions on Development Incentives*, www.cfed.org (2002). If each state and local government is free to impose labor agreements on private recipients of such subsidies in order to "shower benefits on workers who were the incumbents' political supporters," as stated in the Court of Appeals opinion (App. at 5a), then little will remain of private sector labor law under the NLRA. Review by this Court is required to address fundamental errors in the Court of Appeals decision, which directly conflict with important precedents of this Court and other federal courts.

In particular, the Court of Appeals erred in failing to adhere to well-settled precedent establishing that "the spending power may not be used as a pretext for regulating labor relations." *Gould,* 475 U.S. at 287 and 291; see also *Boston Harbor*, 507 U.S. 218, 226-27. As further noted above, other circuits have interpreted this Court's decisions as requiring specific findings that were not made by the Seventh Circuit, in order for a state law to escape the inference that state impositions on private employers are regulatory in nature. *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686, 693 (5th Cir. 1999); *Olympic Pipe Line Co. v. City of Seattle*, 437 F. 3d 872, 881 (9th Cir. 2005); and *Sprint Spectrum L.P. d/b/a Sprint PCS v. Mills*, 283 F. 3d 404 (2d Cir. 2002); *see also Healthcare Ass'n of New York State, Inc. v. Pataki*, 388 F. Supp. 2d 6, 23 (N.D. NY 2005), *appeal pending* (2d Cir.).

Specifically, the Fifth, Ninth, and Second circuits have each held that state laws must be found to be regulatory in nature unless they are found to "essentially reflect the [public] entity's own interest in its efficient procurement of needed goods and services, as measured by

comparison with the typical behavior of private parties in similar circumstances" and to "have a narrow scope ... [to] defeat an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem." *Cardinal Towing, supra*, 180 F.3d at 693, quoted in each of the other circuit decisions cited above.

Had the Seventh Circuit applied this test to the challenged Illinois statute, as it should have done, then it would have been compelled to find preemption. Plainly, the IRFPDA's labor provisions do not reflect *any* State proprietary interest in its own efficient procurement of needed goods and services. Nor is the State's action comparable to typical behavior of private parties in similar circumstances; indeed private parties who are not "employers in the construction industry" are prohibited from imposing labor agreements on others by virtue of the "hot cargo" prohibitions of Section 8(e) of the NLRA. Finally, far from having a "narrow scope," the challenged provisions of the IRFPDA place no restrictions whatsoever on the scope of the mandated labor agreements. Certainly, unlike *Boston Harbor*, the Illinois statute is not limited in its impact to a single construction project but instead applies across the board to all renewable fuels projects subsidized by the state.

The Court of Appeals Decision also conflicts with the recent holding of the Seventh Circuit itself in *Metropolitan Milwaukee Ass'n of Commerce v. Milwaukee County*, 431 F. 3d 277 (7th Cir. 2005). In *Metropolitan Milwaukee,* the Court of Appeals struck down a county ordinance imposing labor neutrality requirements on certain county contractors. The court there interpreted *Boston Harbor* to mean that "if a private purchaser of construction services required his contractors to negotiate pre-hire agreements, there would be no violation of the National Labor Relations Act (the Act authorizes such agreements, 29 U.S.C. § 158(f) *** We take from *Boston Harbor* the rule

that public entities can impose pre-hire agreements on their contractors, just as private entities can." *Id.* at 282.

In the present case, however, the Court of Appeals conceded that Illinois is not contracting with the grantee owners of the fuel plants. (App. at 2a). Moreover, because the grantee owners are not employers in the construction industry, they are not covered by Section 8(f) and are not allowed by the NLRA to enter into the type of labor agreements being mandated in Illinois. *See Columbus Bldg. & Const. Trades Council (Kroger Co.)*, 149 NLRB 1224, 1225-6 (1964), and subsequent cases. The Court of Appeals opinion gave no notice to these important facts.

Also in *Metropolitan Milwaukee,* the appeals court closely examined the likely "spillover effects" of the challenged ordinance, finding that the law there at issue was not sufficiently narrow to avoid affecting labor relations of private contractors beyond their government contracts. 431 F. 3d at 279. The court in the present case mischaracterized and therefore improperly distinguished the Milwaukee ordinance as "prescrib[ing] how employers must handle labor relations in all aspects of their business." (App. 4a). In reality, the present Illinois statute, which contains no limits on the scope of the mandated project labor agreements and affects not just one project but every subsidized renewable fuels project in the state, has every bit as much potential for "spillover effects" as the ordinance struck down in *Metropolitan Milwaukee*.

The inconsistency between *Metropolitan Milwaukee* and the presently challenged decision is a direct result of the Seventh Circuit's failure to make the findings required by the *Cardinal Towing* test. A state law that forces all recipients of state funds for renewable fuels development projects to enter into labor agreements simply cannot be said to have a "narrow scope" and can only be understood as encouraging a

general labor policy rather than addressing any specific proprietary problem of the state.

Finally, the Court of Appeals opinion conflicts with the Seventh Circuit's previous interpretation of *Boston Harbor* in *Colfax Corp. v. Illinois Tollway Authority,* 79 F. 3d 631 (7th Cir. 1996). In *Colfax,* the appeals court upheld a single-project labor agreement requirement, while expressly limiting its holding as follows: "Illinois has not enacted a statute. The Authority has not passed a general rule. The Authority was contracting for services on a specific project. *** So long as that is true and the frontier is pushed no farther from *Boston Harbor* than it is here, we will not [find preemption]." *Colfax, supra*, 79 F. 3d at 634-5. In the present case, Illinois has now enacted a statute that is extremely broad and general in its scope, and the state is *not* contracting for services. The present Court of Appeals opinion has "pushed the frontier" so far from *Boston Harbor* as to create a direct conflict which must be resolved by this Court.

II. The Court of Appeals Has Invented A New And Erroneous Test For Determining When Use of State Spending Power Constitutes Regulation Under The NLRA, In Direct Conflict With Established Precedent.

In finding that Illinois' new labor mandates are not preempted by the NLRA, the Court of Appeals improperly relied on Supreme Court cases having nothing to do with federal labor preemption of state law. Instead, the cases cited by the Court of Appeals address exclusively the federal government's exercise of its own spending powers. App. 3a-5a, *citing Rust v. Sullivan*, 500 U.S. 173 (1991); *South Dakota v. Dole*, 483 U.S. 203 (1987); and *National Endowment of the Arts v. Finley,* 524 U.S. 569 (1998). As

noted above, neither the district court nor any of the parties to this appeal relied on or briefed the Court of Appeals on any of these cases, because their holdings simply do not apply to labor law preemption issues.[2] Constitutional limits on federal spending "is an entirely different question from what States may do with the [National Labor Relations] Act in place." *Wisconsin Dept. of Ind., Labor and Human Relations v. Gould, supra*, 475 U.S. at 290.

Even if *Rust, Dole*, and *Finley* somehow were deemed to have any application to the present appeal, however, they do not stand for the propositions ascribed to them by the Court of Appeals opinion. Rather, the Seventh Circuit misapplied the cases and misstated their holdings. In each of these cases, this Court merely recognized that the federal government may choose to fund one program to the exclusion of others. Therefore, it may impose conditions on grant recipients which prohibit them from spending grant money on unauthorized purposes. *Finley*, 524 U.S. 569 (1998); *Rust*, 500 U.S. 173 (1991). But, as explained in *Rust*:

> In contrast, our 'unconstitutional conditions' cases involve situations in which the Government has placed a condition on the *recipient* of the subsidy rather than on a

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[2] *Rust v. Sullivan*, 500 U.S. 173 (1991) held that the federal government does not violate the First Amendment when it restricts clinics from using federal grant money to provide post-pregnancy abortion counseling. *National Endowment or the Arts v. Finley*, 524 U.S. 569 (1998), likewise found the federal government did not violate the First Amendment when it imposed decency standards in the criteria for an NEA grant. *South Dakota v. Dole*, 483 U.S. 203 (1987) held that the Constitution does not restrict the federal government from conditioning a State's receipt of highway funds on adoption of the drinking age of 21.

> particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program.

Id. at 197. Based upon this holding, *Rust* and its progeny offer no support for a state law which makes employer adoption of a union agreement a condition of the receipt of state grants or funds.

The subsidy condition imposed by the Illinois statute should have been recognized by the Court of Appeals as exactly the type of subsidy condition which even the *Rust* analysis prohibits. The IRFPDA plainly conditioned receipt of the state's funding grants upon the owners relinquishing their rights, as guaranteed by the NLRA, to decline to impose labor agreements on their own companies and/or on unwilling employees or contractors.

Similarly, the Court of Appeals opinion erroneously cited *South Dakota v. Dole* for the assertion that state imposition of conditions on subsidies are not a form of forbidden regulation. (App. at 4a). That is not the holding of *Dole*. The *Dole* decision actually referenced multiple restrictions on even the federal government's exercise of its spending power, ignored by the Court of Appeals opinion.[3] The Illinois labor mandate fails every one of the *Dole* tests. The labor conditions were plainly not pursued for "the general welfare" and were not "reasonably related to the

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[3] The *Dole* Court identified four restrictions on federal spending powers, none of which are addressed by the Seventh Circuit Opinion: (1) the spending conditions must be in pursuit of "the general welfare," as opposed to special interests; (2) the spending conditions must be unambiguous; (3) the spending conditions must be related to the federal interest in particular national projects or programs; and (4) the conditions must not conflict with constitutional provisions. 483 U.S. at 208.

purpose of the expenditure" (483 U.S. at 208), given that the Court of Appeals itself found it "likely" that the challenged provisions of the law were passed so that state officials could "assist organized labor." (App. at 5a). The statute is also fraught with ambiguity as to the scope, coverage and parties to any project labor agreements. Finally, the statute conflicts directly with a constitutional provision, i.e., the Supremacy Clause, another violation of the *Dole* standard. *See* 483 U.S. at 208.

The new standard created by the Seventh Circuit in this case, if allowed to stand, would render irrelevant this Court's holding in *Boston Harbor*. Whereas *Boston Harbor* created a narrow exemption from labor law preemption for public entities engaged in market participation on individual projects, the Seventh Circuit opinion here would give license to the states to pass laws setting labor policy for private employers on multiple projects without any pretense of state proprietary interest. Clearly, Illinois is no longer "exemplifying" market forces in renewable fuels development (*Boston Harbor*, 507 U.S. at 227); rather, the state is regulating labor policy. The Court of Appeals' improper reliance on the inapposite authority of *Rust, Dole,* and *Finley*, in conflict with the settled application of *Boston Harbor* and *Gould* in other circuits, fatally undermines the decision below and urgently calls for review by this Court.

CONCLUSION

For each of the reasons set forth above, the Petition for Writ of Certiorari should be granted on an issue of exceptional importance, in order to resolve direct conflicts between the Court of Appeals Opinion and decisions of other courts and of this Court.

Respectfully submitted,

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APPENDIX

APPENDIX

Northern Illinois Chapter of Associated Builders and Contractors, Inc. v. Lavin, 431 F. 3d 1004 (7th Cir. 2005).....1a

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In the
United States Court of Appeals
For the Seventh Circuit

No. 05-2174
NORTHERN ILLINOIS CHAPTER OF ASSOCIATED BUILDERS AND CONTRACTORS, INC., and LOBERG EXCAVATING, INC.,

Plaintiffs-Appellants,

v.

JACK LAVIN, Director of the Illinois Department of Commerce and Economic Opportunity,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Western Division.
No. 04 C 50357—Philip G. Reinhard, *Judge*.

ARGUED OCTOBER 28, 2005-
DECIDED DECEMBER 9, 2005

Before EASTERBROOK, MANION, and ROVNER, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. Illinois subsidizes the construction or renovation of renewable-fuel plants—principally facilities that make ethanol. One condition of a grant is that the recipient "enter into a project labor agreement". 20 ILCS 689/15(a)(3). The agreement must establish wages and benefits and must include a no-strike clause. 20 ILCS 689/25(a). As a practical matter such agreements can be achieved only by employers that recognize and bargain with labor unions. An association of non-union contractors (and one of its members) filed this suit under 42 U.S.C. §1983, seeking a declaratory judgment that the requirement of a project labor agreement is preempted by

federal law. See *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103 (1989). Relying on *Building & Construction Trades Council v. Associates Builders & Contractors of Massachusetts*, 507 U.S. 218 (1993) (*Boston Harbor*), the district court entered judgment for Illinois.

Boston required its contractors to negotiate project labor agreements under which all workers would be referred by union hiring halls and would be obliged to pay dues under union-security clauses; in exchange the unions would agree to forego strikes. Federal law permits such prehire agreements in the construction industry. See 29 U.S.C. §158(e), (f). See also *Jim McNeff, Inc. v. Todd*, 461 U.S. 260 (1983); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645 (1982). *Boston Harbor* holds that a public owner has the same entitlement as a private owner to decide how it will manage a construction project. Federal law preempts all state regulation of those aspects of labor relations that are arguably protected, arguably prohibited, or left to the domain of market forces. See *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959); *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976). A city or state acting as proprietor, however, is a market participant rather than a market regulator. *Boston Harbor*, 507 U.S. at 230-31.

The district court concluded that Illinois is acting as a proprietor in its renewable-fuels program. The problem with this view is that the state is not the proprietor *of* anything. It does not own any renewable-fuels project, either before or after granting a subsidy. The project's owner, not the state, is its proprietor. Boston hired the general contractors for the project; Illinois does not hire contractors. Nor does it invest in the projects through bonds. Contrast *Hotel Employees v. Sage Hospitality Resources, LLC*, 390 F.3d 206 (3d Cir. 2004). All it has done is set a condition on grants to private proprietors.

To say that Illinois is not acting as a proprietor is not, however, to resolve the main question. *Boston Harbor* holds that *if* a state acts as a proprietor, then it may insist on the sort of prehire agreements that federal labor law permits private owners to adopt. It does not hold that *only if* a state acts in this capacity is its decision compatible with federal law. The Court stated the rule this way: "[T]he NLRA prevents a State from regulating within a protected zone, whether it be a zone protected and preserved for market freedom, see *Machinists*, or for NLRB jurisdiction, see *Garmon*. A State does not regulate, however, simply by acting within one of those protected areas. . . . We have held consistently that the NLRA was intended to supplant state labor *regulation*, not all legitimate state activity that affects labor." *Boston Harbor*, 507 U.S. at 226-27 (emphasis in original). The need to distinguish regulation from other governmental activity is the Court's theme in *Boston Harbor*.

So is the conditional offer of a subsidy for renewable-fuels plants a form of regulation? It is hard to see how it could be: Illinois does not seek to affect labor relations generally. Both labor and management are free to make independent decisions with respect to all activities other than those for which the state pays. The question "is a condition on the receipt of a grant a form of regulation?" comes up frequently, and the answer almost always is negative. Consider, for example, the many conditions on grants to states. The national government lacks the authority to regulate how states behave; it cannot direct them to pass or enforce laws. See *Printz v. United States*, 521 U.S. 898 (1997). But it can set conditions on grants, and a state's decision to take the money obliges it to respect the conditions. Thus *South Dakota v. Dole*, 483 U.S. 203 (1987), held that states that accept federal highway construction money must set and enforce speed limits specified by

Congress. That condition on the subsidy was not, the Court held, a form of forbidden regulation.

Similarly Congress lacks the authority to regulate what physicians say about abortion but may set conditions on federal grants and require those who accept the money to follow federal rules for family-planning advice. *Rust v. Sullivan*, 500 U.S. 173 (1991). The condition differs from regulation because any physician or clinic may decline the offer. The list of similar decisions is lengthy. See, e.g., *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998); *Buckley v. Valeo*, 424 U.S. 1, 57 & n.65 (1976).

Conditions on spending may become regulation if they affect conduct other than the financed project. *Wisconsin Department of Industry v. Gould Inc.*, 475 U.S. 282 (1986), illustrates this limit. Wisconsin refused to purchase goods or services from firms that had violated the National Labor Relations Act three or more times during the preceding five years. The Supreme Court understood this as an effort to control how employers behave when *not* dealing with the state, and thus as a form of regulation. "Because Wisconsin's debarment law functions unambiguously as a supplemental sanction for violations of the NLRA, it conflicts with the Board's comprehensive regulation of industrial relations in precisely the same way as would a state statute preventing repeat labor law violators from doing any business with private parties within the State." *Id.* at 288. See also the discussion of *Gould* in *Boston Harbor*, 507 U.S. at 228-30. Our decision in *Metropolitan Milwaukee Association of Commerce v. Milwaukee County*, 2005 U.S. App. LEXIS 26467 (7th Cir. Dec. 5, 2005) likewise concludes that a purchasing rule prescribing how employers must handle labor relations in all aspects of their business is preempted by federal labor law. Illinois is concerned exclusively with how subsidized renewable-fuels projects contract for labor; its condition is project-specific.

Boston Harbor is just one illustration of the proposition that states may act in commerce without regulating commerce. The situation in this litigation is another illustration. See also *Colfax Corp. v. Illinois State Toll Highway Authority*, 79 F.3d 631 (7th Cir. 1996). Any owner or contractor that does not want to deal with organized labor may indulge that preference. The lure of a subsidy may lead firms at the margin to reach labor agreements that they would not otherwise have signed, but if an incentive to change one's conduct is a form of "regulation" then *South Dakota v. Dole*, *Rust v. Sullivan*, and many other cases were wrongly decided. Federal labor laws give both workers and employers a right to avoid unions, but states may pay them to surrender that right even though states can't confiscate it by sumptuary legislation. See also *Building & Construction Trades Department v. Allbaugh*, 295 F.3d 28 (D.C. Cir. 2002) (executive order specifying conditions under which project-labor agreements are appropriate for federally subsidized construction projects is compatible with federal labor law).

If (as seems likely) Illinois has taken the approach in this law because state officials want to assist organized labor as well as the farmers who supply the grain to be made into ethanol and the owners of ethanol plants, that is neither a surprise nor a reason for invalidity. Most legislation is the product of coalitions among interest groups. Boston wanted to clean up its harbor, but there can be little doubt that it also wanted to shower benefits on workers who were the incumbents' political supporters. Many a public project is bigger or more expensive than it need be, in order to enlist the support of multiple interest groups. Federal preemption doctrine evaluates what legislation *does*, not why legislators voted for it or what political coalition led to its enactment. This statute does not affect people who spurn the state's largesse. Because Illinois has limited its condition to the project financed by the subsidy, it has not engaged in

"regulation" under the approach of *Boston Harbor* or *Gould*, and its conditions are not preempted by federal labor law.

AFFIRMED

A true Copy:
Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

In the
United States Court of Appeals
For the Seventh Circuit

February 6. 2006

Before

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. DANIEL A. MANION, Circuit Judge

Hon. ILANA DIAMOND ROVNER, Circuit Judge

NORTHERN ILLINOIS CHAPTER OF ASSOCIATED BUILDERS AND CONTRACTORS, INC., and LOBERG EXCAVATING, INC., *Plaintiffs-Appellants*	* * *	Appeal from the United States District Court for the Northern District of Illinois, Western Division
No. 05-2174 v.	*	
JACK LAVIN, Director of the ILLINOIS DEPARTMENT OF COMMERCE AND ECONOMIC OPPORTUNITY, *Defendant-Appellee.*	* * *	No. 04 C 50357 Philip G. Reinhard, *Judge*.

Order

Plaintiffs-appellants filed a petition for rehearing and rehearing en banc on December 23, 2005. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all of the judges on the panel have

voted to deny rehearing. The petition for rehearing is therefore DENIED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

NORTHERN IL CHAPTER BUILDERS	)	
	)	
Plaintiff,	)	
	)	04 C 50357
v.	)	
	)	
JACK LAVIN,	)	
	)	
Defendant,	)	
	)	

DOCKET ENTRY TEXT:

For the reasons stated below, defendant's motion to dismiss is granted with prejudice. Plaintiffs' motion for summary judgment is denied. This case is hereby dismissed in its entirety.

STATEMENT

Plaintiffs, Northern Illinois Chapter of Associated Builders and Contractors, Inc. ("Northern") and Loberg Excavating, Inc. ("Loberg") bring this action against Jack Lavin, in his official capacity as Director of the Illinois Department of Commerce & Economic Opportunity, seeking a declaration that Sections 15 and 25 of the Illinois Renewable Fuels Development Program Act, 20 ILCS 689/15, 689/25 ("IRFDPA") are preempted by the National Labor Relations Act, 29 U.S.C. § 151 et seq. ("NLRA") and are therefore, unconstitutional pursuant to the Supremacy Clause of the U.S. Constitution. Defendant moves to dismiss for lack of Article III standing, lack of prudential standing, and because the challenged IRFDPA sections are not preempted as a matter of law. Plaintiffs move for summary

judgment declaring Sections 15 and 25 of the IRFDPA are preempted by the NLRA.

The IRFDPA establishes grants to recipients who are constructing, modifying, altering or retrofitting renewable fuel plants in Illinois. One of the requirements for the grant recipient is that the recipient must enter into a "project labor agreement." (PLA") 20 ILCS 689/15(a) (3). A project labor agreement must include provisions establishing 1) minimum hourly wages for each class of labor organization employee; 2) benefits and other compensation for each class of labor organization employee; and 3) that no strike or dispute will be engaged in by the labor organization employees. 20 ILCS 689/25 (a).

Defendant asserts plaintiffs lack standing to bring this action because they have not established that Loberg or any member of Northern ever bid on a project that was subject to the PLA requirements of the IRFDPA. Defendant says plaintiffs' claim they were deterred from bidding because of the IRFDPA requirements is not enough of an "injury-in-fact" to confer standing. Plaintiffs have alleged that they were advised Illinois River Energy, LLC, which is building an ethanol plant, has applied for a grant under IRFDPA. They claim the requirement that subcontractors must enter into a PLA is a violation of their federally granted right to operate without entering agreements with a union and that the existence of this requirement has deterred them from bidding on the project. Plaintiffs' allegations are sufficient to confer standing on them under Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville, 508 U.S. 656, 666 (1973). As non-union contractors, plaintiffs have alleged an injury that they must enter a union contract in order to work on a project that has received an IRFDPA grant. When the government erects a barrier that makes it more difficult for a member of one group to obtain a benefit than it is for members of another

group, a member of the disadvantaged group has standing to challenge the barrier.Id. Plaintiffs' allegations are sufficient to allege constitutional standing for purposes of defeating a motion to dismiss.

Defendant also argues plaintiffs lack prudential standing to challenge the IRFDPA. To have prudential standing "a plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit." Bennett v. Spear, 520 U.S. 154, 162 (1997). Defendant contends The "NLRA was instituted as a pro-employee law" and that plaintiffs, as employers, are not within the zone of interest to be protected by the NLRA, Def. Reply Brief, p.2. However, the NLRA regulates collective bargaining between employers and employees. Plaintiffs, as employers, are within the zones of interest regulated by the NLRA and have prudential standing to challenge the IRFDPA as being preempted by the NLRA.

Defendant argues that plaintiffs' claims must be dismissed because the NLRA does not preempt the IRFDPA. The NLRA does not expressly preempt state law but courts have found preemption in two situations: 1) state regulation of activities protected by section 7 of the NLRA, made an unfair labor practice by section 8 of the NLRA or activities arguably protected or prohibited by the NLRA ("Garmon preemption"); and 2) state regulation of areas Congress intended to leave to the free play of the market ("Machinists preemption"). Bldg. & Constr. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc., 507 U.S. 218, 224 (1993). When a state takes action affecting labor relations but does so for a proprietary rather than regulator purpose its action is not preempted by the NLRA. Id. At 232-33. "[T]he [g]overnment unquestionably is the proprietor of its own funds, and when it acts to ensure the most effective use of those funds, it is acting in a

proprietary capacity." Bldg. & Constr. Trades Dept. AFL-CIO v. Allbaugh, 295 F.3d 28, 35 (D.C. Cir. 2002), cert. denied, 537 U.S. 1171 (2003). Whether the government "is a lender to or benefactor of, rather than the owner of, a project is not inconsistent with its acting just as would a private entity; a private lender or benefactor also would be concerned that its financial backing be used efficiently." Id. Where a condition only applies to projects owned by or funded by the state it goes to the state's proprietary interest and, therefore, is not subject to NLRA preemption. See Id. at 36; see also, Hotel Employees & Restaurant Employees Union, Local 57 v. Sage Hospitality Resources, LLC, 390 F.3d 206 (3rd Cir. 2004); Metro, Milwaukee Ass'n of Commerce v. Milwaukee County, NO. 01-C-0149, 2005 WL 433139 (E.D. Wisc. Feb. 11, 2005). Here, the statutory requirements only apply to projects funded by the IRFDPA. The state is acting for a proprietary rather than regulatory purpose. The challenged sections of the IRFDPA are not preempted by the NLRA.

For the foregoing reasons, defendant's motion to dismiss is granted with prejudice. Plaintiffs' motion for summary judgment is denied.

ILLINOIS RENEWABLE FUELS DEVELOPMENT PROGRAM ACT, § 20 ILCS 689/1-30, P.A. 93-15.

Sec. 1. Short title. This Act may be cited as the Illinois Renewable Fuels Development Program Act.

Sec. 5. Findings and State policy. The General Assembly recognizes that agriculture is a vital sector of the Illinois economy and that an important growth industry for the Illinois agricultural sector is renewable fuels production. Renewable fuels produced from Illinois agricultural products hold great potential for growing the State's economy, reducing our dependence on foreign oil supplies, and improving the environment by reducing harmful emissions from vehicles. Illinois is the nation's leading producer of ethanol, a clean, renewable fuel with significant environmental benefits. The General Assembly finds that reliable supplies of renewable fuels will be integral to the long term energy security of the United States. The General Assembly declares that it is the public policy of the State of Illinois to promote and encourage the production and use of renewable fuels as a means not only to improve air quality in the State and the nation, but also to grow the agricultural sector of the Illinois economy. To achieve these public policy objectives, the General Assembly hereby authorizes the creation and implementation of the Illinois Renewable Fuels Development Program within the Department.

Sec. 10. Definitions. As used in this Act:

"Biodiesel" means a renewable diesel fuel derived from biomass that is intended for use in diesel engines.

"Biodiesel blend" means a blend of biodiesel with petroleum-based diesel fuel in which the resultant product contains no less than 1% and no more than 99% biodiesel.

"Biomass" means non-fossil organic materials that have an intrinsic chemical energy content. "Biomass" includes, but is not limited to, soybean oil, other vegetable oils, and ethanol.

"Department" means the Department of Commerce and Community Affairs.

"Diesel fuel" means any product intended for use or offered for sale as a fuel for engines in which the fuel is injected into the combustion chamber and ignited by pressure without electric spark.

"Director" means the Director of Commerce and Community Affairs.

"Ethanol" means a product produced from agricultural commodities or by-products used as a fuel or to be blended with other fuels for use in motor vehicles.

"Fuel" means fuel as defined in Section 1.19 of the Motor Fuel Tax Law [35 ILCS 505/1.19].

"Gasohol" means motor fuel that is no more than 90% gasoline and at least 10% denatured ethanol that contains no more than 1.25% water by weight.

"Gasoline" means all products commonly or commercially known or sold as gasoline (including casing head and absorption or natural gasoline).

"Illinois agricultural product" means any agricultural commodity grown in Illinois that is used by a production facility to produce renewable fuel in Illinois, including, but not limited to, corn, barley, and soy beans.

"Labor Organization" means any organization defined as a "labor organization" under Section 2 of the National Labor Relations Act (29 U.S.C. 152).

"Majority blended ethanol fuel" means motor fuel that contains no less than 70% and no more than 90% denatured ethanol and no less than 10% and no more than 30% gasoline.

"Motor vehicles" means motor vehicles as defined in the Illinois Vehicle Code [625 ILCS 5/1-100 et seq.] and watercraft propelled by an internal combustion engine.

"Owner" means any individual, sole proprietorship, limited partnership, co-partnership, joint venture, corporation, cooperative, or other legal entity, including its agents, that operates or will operate a plant located within the State of Illinois.

"Plant" means a production facility that produces a renewable fuel. "Plant" includes land, any building or other improvement on or to land, and any personal properties deemed necessary or suitable for use, whether or not now in existence, in the processing of fuel from agricultural commodities or by-products.

"Renewable fuel" means ethanol, gasohol, majority blended ethanol fuel, biodiesel blend fuel, and biodiesel.

Sec. 15. Illinois Renewable Fuels Development Program. (a) The Department must develop and administer the Illinois Renewable Fuels Development Program to assist in the construction, modification, alteration, or retrofitting of renewable fuel plants in Illinois. The recipient of a grant under this Section must:

(1) be constructing, modifying, altering, or retrofitting a plant in the State of Illinois;

(2) be constructing, modifying, altering, or retrofitting a plant that has annual production capacity of no less than 30,000,000 gallons of renewable fuel per year; and

(3) enter into a project labor agreement as prescribed by Section 25 of this Act [20 ILCS 689/25].

(b) Grant applications must be made on forms provided by and in accordance with procedures established by the Department.

(c) The Department must give preference to applicants that use Illinois agricultural products in the production of renewable fuel at the plant for which the grant is being requested.

Sec. 20. Grants. Subject to appropriation from the Build Illinois Bond Fund, the Director is authorized to award grants to eligible applicants. The annual aggregate amount of grants awarded shall not exceed $ 15,000,000.

Sec. 25. Project labor agreements. (a) The project labor agreement must include the following:

(1) provisions establishing the minimum hourly wage for each class of labor organization employee;

(2) provisions establishing the benefits and other compensation for each class of labor organization employee; and

(3) provisions establishing that no strike or disputes will be engaged in by the labor organization employees.

The owner of the plant and the labor organizations shall have the authority to include other terms and conditions as they deem necessary.

(b) The project labor agreement shall be filed with the Director in accordance with procedures established by the Department. At a minimum, the project labor agreement must provide the names, addresses, and occupations of the owner of the plant and the individuals representing the labor organization employees participating in the project labor agreement. The agreement must also specify the terms and conditions required in subsection (a).

Sec. 30. Administration of the Act; rules. The Department shall administer this Act and shall adopt any rules necessary for that purpose.

Sec. 99. Effective Date. This Act takes effect upon becoming law.

NOTES:
EFFECTIVE DATE.
P.A. 93-15 was approved June 11, 2003.

NATIONAL LABOR RELATIONS ACT

UNFAIR LABOR PRACTICES

Sec. 8. [§ 158.]

* * *

(d) [Obligation to bargain collectively] For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession....

(e) [Enforceability of contract or agreement to boycott any other employer; exception] It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection (e) [this subsection] shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work....

(f) [Agreements covering employees in the building and construction industry] It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act [subsection (a) of this section] as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act [section 159 of this title] prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agree-ment, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act [subsection (a)(3) of this section]: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e) [section 159(c) or 159(e) of this title].

(2)

No. 05-1421

Supreme Court, U.S.
FILED
SEP 1 - 2006
OFFICE OF THE CLERK

In the Supreme Court of the United States

NORTHERN ILLINOIS CHAPTER OF ASSOCIATED BUILDERS AND CONTRACTORS, INC., AND LOBERG EXCAVATING, INC., PETITIONERS,

v.

JACK LAVIN, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE ILLINOIS DEPARTMENT OF COMMERCE AND ECONOMIC OPPORTUNITY, RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In *Bldg. & Constr. Trades Council v. Associated Builders and Contractors of Massachusetts/Rhode Island*, 507 U.S. 218 (1993) (*Boston Harbor*), this Court held that the National Labor Relations Act (the NLRA) preempts only "market *regulation*," and only in certain circumstances. *Id.* at 227 (emphasis in original). The Court ruled that a local government's requirement that contractors comply with a project labor agreement (PLA) on a construction project was not "market regulation" because the NLRA would permit a private party to require a PLA, and the PLA was tailored to the government's interest in quick, cost-effective completion of its project by skilled workers. Here, the Seventh Circuit held that the Illinois Renewable Fuels Program Development Act (the Act) (20 ILCS 689/1 *et seq.* (2004)), which conditions a grant of construction funds for an alternative fuel facility on the grantee's agreement to use a PLA for that construction, is not "market regulation."

The questions presented are:

1. Whether the Act's grant condition constitutes "market regulation" within the meaning of *Boston Harbor*.

2. If so, whether the Act either falls within the National Labor Relations Board's exclusive authority to implement the NLRA, and thus is preempted under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959) (*Garmon*), or thwarts the play of market forces between labor and management that Congress intended to be free from *all* government regulation, and thus is preempted under *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976) (*Machinists*).

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Other Authorities

Roger C. Hartley, *Preemption's Market Participant Immunity – A Constitutional Interpretation: Implications for Living Wage and Labor Peace Policies*, 5 U. Pa. J. Lab. & Empl. L. 229 (2003) 11-12

R. Stern et al., *Supreme Court Practice*, § 4.6 (8th ed. 2002) 17, 19

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BRIEF IN OPPOSITION

This Court's review is not necessary either to secure and maintain uniformity of this Court's decisions or to resolve any circuit conflict.

The Seventh Circuit's conclusion that the Illinois Renewable Fuels Development Program Act (the Act) (20 ILCS 689/1 *et seq.* (2004)) is not "market regulation" is fully consistent with *Bldg. & Constr. Trades Council v. Associated Builders and Contractors of Massachusetts/Rhode Island*, 507 U.S. 218 (1993) (*Boston Harbor)* and National Labor Relations Act (NLRA) preemption rulings from the Third and District of Columbia Circuits. Indeed, the opposite conclusion would have created a conflict with *Boston Harbor* and its progeny – it would mean that to condition a grant of state funds on the grantee's use of a PLA for construction at the grantee's facility is "market regulation," even though the NLRA permits private employers in the construction industry to use PLAs and even when the condition is specifically tailored to the State's interest in efficient, skilled, and cost-effective construction of a funded facility that will improve the environment. The Seventh Circuit avoided, not created, a circuit conflict.

In addition, though they fault the Seventh Circuit for referring to federal spending cases, petitioners' purported circuit conflict relies on opinions from the Second, Fifth, and Ninth Circuits that do not concern NLRA preemption. These cases also do not conflict with the Seventh Circuit's analysis. As for petitioners' insistence that there is an intra-circuit conflict, the Seventh Circuit's rejection of petitioners' petition for rehearing en banc, without a single vote in favor, indicates that there is none.

Another reason to deny the petition is that it would make no difference in the outcome here even if the Act were "market

regulation." The Act does not fall within either the zone of the NLRB's exclusive authority to implement the NLRA (for preemption under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959) (*Garmon*)) or the zone for the play of market forces free from *all* government regulation (for preemption under *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976) (*Machinists*)). In fact, as *Boston Harbor* teaches, a PLA does not "regulate" market forces, it "exemplifies" them. 502 U.S. at 233. Accordingly, the Act would not be preempted even if it were "market regulation."

STATEMENT

A. The Illinois Renewable Fuels Development Program Act (the Act) (20 ILCS 689/1 *et seq.* (2004)) created a grant program that is administered by the Illinois Department of Commerce and Economic Opportunity, of which respondent Jack Lavin is the Director. 20 ILCS 689/15, 689/20 (2004) (Pet. App. 15a-16a). Under the Act, construction grants totaling no more than $15,000,000 annually (assuming an appropriation has been made) are given to those who own or operate an alternative fuel facility of a certain size, if the grant recipient agrees to enter into a PLA for the construction. 20 ILCS 689/15(a), 689/20 (2004) (Pet. App 16a-17a); 32 Ill. Admin. Code §§ 130.20, 130.50.

Contrary to petitioners' characterization of the Act as "broad and general" and "fraught with ambiguity as to the scope, coverage, and parties to any PLA" (Pet. 11, 14), the Act and its regulations are forthright. The PLA must establish the minimum compensation and benefits for each class of labor organization employees, and must prohibit them from engaging in strikes or labor disputes. 20 ILCS 689/25 (2004) (Pet. App. 16a-17a); 32 Ill. Admin. Code § 130.60. The regulations further specify that a PLA must (1) set forth mutually binding

procedures for resolving jurisdictional labor disputes and grievances that arise before the work is completed; (2) permit the selection of the most qualified lowest responsible bidder, without regard to its non-union or union status at other construction sites; and (3) bind all contractors and subcontractors on the project through the inclusion of appropriate bid specifications. 32 Ill Admin. Code § 130.60.

Although petitioners insist that the only state interests underlying the Act are air quality and agriculture (Pet. 3), the Act's implementing regulations describe the state interests that the Act's PLA grant condition further:

> [w]hen awarding public funds for public works projects, the State of Illinois has a compelling interest in ensuring that the highest standards of quality and efficiency are applied to the project. *[PLAs] provide the State of Illinois with a guarantee that specific public works projects will be completed with highly skilled workers, and also function as a means to provide for peaceful, orderly and mutually binding procedures for resolving labor issues.*

32 Ill. Admin. Code § 130.10 (emphasis added). In addition, when signing the Act into law, the governor explained that the PLA "ensur[ed] the most efficient use of State funds." www.ilga.gov/legislation/93/hb/PDF/09300HB0046gms.pdf.

B. Petitioner Northern Illinois Chapter of Associated Builders and Contractors, Inc. (ABC), is an association of construction contractors and related firms, of which petitioner Loberg Excavating, Inc., is a member. Pet. App. 1a. They sued Director Lavin, alleging that to require a grantee's subcontractors to enter into a PLA violates their federal right not to do so and that the Act's PLA requirement deterred them from bidding on a project for which a grant had been sought. Pet. App. 10a.

Contrary to petitioners' assertion that judgment was entered on cross-motions for summary judgment (Pet. 5), the district court granted respondent's motion to dismiss the case with prejudice for failure to state a claim, finding that the Act was not "market regulation" for *Boston Harbor* purposes. Pet. App. 9a-12a. The district court concluded that Illinois did not have to be the owner of a subsidized facility for its conduct to fall outside the NLRA's preemptive scope, reasoning that "'[t]he [g]overnment unquestionably is the proprietor of its own funds, and when it acts to ensure the most effective use of those funds, it is acting in a proprietary capacity." Pet. App. 11a-12a (quoting *Bldg. & Constr. Trades Dept. AFL-CIO v. Allbaugh*, 295 F.3d 28, 35 (D.C. Cir. 2002)). The district court found no difference, for *Boston Harbor* purposes, between a government's acts as a lender or benefactor and its acts as an owner, observing that "'a private lender or benefactor also would be concerned that its financial backing was used efficiently.'" Pet. App. 12a (quoting *Allbaugh*, 295 F.3d at 35). Because the Act's PLA condition applied only to projects funded thereunder, the district court concluded, Illinois was "acting for a proprietary rather than regulatory purpose," so the NLRA did not preempt the Act. *Ibid.*

C. The Seventh Circuit unanimously affirmed, holding that the Act was not "market regulation" for purposes of *Boston Harbor*. Pet. App. 1a-6a. After noting that the NLRA permits PLAs in the construction industry, the court addressed a semantic issue, stating that Illinois was not a "proprietor" because it did not own the funded facilities. Pet. App. 2a. It also observed that, under the Act, Illinois neither hired the contractors nor invested in the facilities through bonds. *Ibid.* (distinguishing *Hotel Employees & Restaurant Employees Union, Local 57 v. Sage Hospitality Resources, LLC*, 390 F.3d 206 (3d Cir. 2004), *cert. denied*, 125 S. Ct. 1944 (2005)). The court cautioned, however, that the *Boston Harbor* inquiry could not be resolved merely by concluding that a State's conduct was

not "proprietary," stressing that *Boston Harbor* did not exclude only "proprietary" acts from the NLRA's preemptive scope. Pet. App. 3a (citing *Boston Harbor*, 507 U.S. at 226-27).

The Seventh Circuit then reiterated *Boston Harbor*'s rule that the NLRA only "'prevents a State from *regulating* within a protected zone, whether it be a zone protected and preserved for market freedom, see *Machinists*, or for NLRB jurisdiction, see *Garmon*.'" *Ibid.* (quoting *Boston Harbor*, 507 U.S. at 226-27) (emphasis added). The court thus reasoned that "'the NLRA was intended to supplant state labor *regulation*, not all legitimate state activity that affects labor.'" *Ibid.* (quoting *Boston Harbor*, 507 U.S. at 226-27) (emphasis in *Boston Harbor*). Therefore, the court concluded, "[t]he need to distinguish regulation from other governmental activity is the Court's theme in *Boston Harbor*." *Ibid.*

The Seventh Circuit then asked whether the Act's conditional offer of a grant was "market regulation" for *Boston Harbor* purposes and concluded it was not, stressing that "Illinois does not seek to affect labor relations generally." *Ibid.* The court found significant that a grantee could decline the funding and that, even if funding were sought and obtained for a particular facility, "[b]oth labor and management are free to make independent decisions with respect to all activities other than those for which the state pays." *Ibid.* The court distinguished between regulating commerce and acting in commerce, explaining that to confiscate the right of owners and contractors to avoid unions would be "regulation," whereas to offer a monetary incentive to relinquish that right would not. Pet. App. 5a.

Observing that courts are frequently asked to decide if a grant condition is a regulation, the Seventh Circuit stated that "the answer almost always is negative," illustrating its point with cases concerning conditional federal grants to individuals and state and local governments. Pet. App. 3a-4a (citing *Printz*

v. United States, 521 U.S. 898 (1997); *South Dakota v. Dole*, 483 U.S. 203 (1987); *Rust v. Sullivan*, 500 U.S. 173 (1991); *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998); and *Buckley v. Valeo*, 424 U.S. 1, 57 & n.65 (1976)). The court acknowledged, however, that a condition on funding may be a "regulation" if it affects employer conduct other than on a financed project. Pet. App. 4a (citing *Wisconsin Dep't of Industry v. Gould, Inc.*, 475 U.S. 282 (1986), which struck down (under *Garmon*) a state statute barring business with vendors who repeatedly violated the NLRA because its effect was to control employer behavior generally, and *Metropolitan Milwaukee Ass'n of Commerce v. Milwaukee County*, 431 F.3d 277 (7th Cir. 2005), which struck down a county purchasing rule that prescribed how employers must handle labor relations in all aspects of their business).

Although petitioners insist that the Seventh Circuit's ruling eviscerates federal labor law by "showering benefits" on political supporters and make much of the Seventh Circuit's speculation that a purpose of the Act was "likely" to assist organized labor (Pet. 8, 14 (citing Pet. App. 5a)), the court also warned that "[f]ederal preemption doctrine evaluates what legislation *does*, not why legislators voted for it or what political coalition led to its enactment." Pet. App. 5a (emphasis in original).

D. Petitioners filed a petition for rehearing en banc, which was denied without a single vote in its favor. Pet. App. 7a.

REASONS FOR DENYING THE PETITION

The petition fails to satisfy any of this Court's criteria for a grant of certiorari.

Labor law preemption principles have been called Delphic (*International Ass'n of Machinists v. Gonzales*, 356 U.S. 617, 619 (1958)), but *Boston Harbor* made one thing crystal clear:

NLRA "preemption doctrines apply only to 'state *regulation.*'" 507 U.S. at 227 (emphasis in original). *Boston Harbor* held that because the NLRA would not prohibit a private employer in the construction industry from using a PLA, and because the government's PLA requirement there was tailored to its interest in efficient and cost-effective construction of its project, the PLA there was not "market regulation." *Id.* at 230-33.

Here, the Seventh Circuit correctly applied *Boston Harbor*'s bright-line test when it concluded that the Act is not "market regulation." Because the Seventh Circuit's opinion is in harmony with *Boston Harbor* and its NLRA preemption progeny in federal appeals courts, and because the opposite conclusion would have conflicted with those rulings, this Court's review is not warranted. Likewise, no inter- or intra-circuit conflict exists that requires this Court's attention. In addition, the Seventh Circuit's mention of federal spending cases is not tantamount to the creating of a new "market regulation" test for NLRA preemption. Moreover, reversal of the Seventh Circuit's opinion would make no difference in the outcome – even if the Act were "market regulation," it neither infringes on the NLRB's exclusive authority to implement the NLRA nor thwarts the free play of market forces. Thus, it does not fall within the preemptive scope of, respectively, *Garmon* or *Machinists*.

I. The Seventh Circuit's Holding That the Act Is Not "Market Regulation" Is Fully Consistent With *Boston Harbor* and Federal Reviewing Courts' Opinions on NLRA Preemption.

Petitioners insist that by holding that the Act is not "market regulation," the Seventh Circuit created "a new and unprecedented exemption from NLRA preemption beyond the previously limited scope of market participation" under *Boston Harbor* and its progeny and "invented a new and erroneous

test" for "market regulation." Pet. 7-14. They misunderstand *Boston Harbor*'s analytical framework.

A. The Seventh Circuit's Conclusion that the Act Is Not "Market Regulation" Fits Squarely Within *Boston Harbor*'s Two-Part Analytical Framework.

Boston Harbor's "market regulation" test for NLRA preemption is straightforward: government conduct is not "market regulation" when it is analogous to a private party's conduct in the marketplace under the NLRA and is tailored to the government's interest. 507 U.S. at 231-32. Here, as the Seventh Circuit noted, the NLRA permits PLAs in the construction industry. Pet. App. 2a. Furthermore, the governor's message and related regulations explained the State's interest in the Act's PLA grant condition: to ensure efficient use of state funds, by guaranteeing highly skilled workers, predictable labor costs, and labor peace, which in turn will expedite construction of these highly technical facilities. www.ilga.gov/legislation/93/hb/PDF/09300HB0046gms.pdf; 32 Ill. Admin. Code § 130.10. Plainly, the Seventh Circuit believed that the Act is specifically tailored to this interest, for it found significant that the Act's PLA requirement applies only to a grantee's facility and thus "does not affect people who spurn the state's largesse" and leaves labor and management free to refuse to use a PLA on all other projects. Pet. App. 5a, 3a.

This reasoning is fully consistent with *Boston Harbor*, which emphasized that the PLA bid specification there permitted contractors who normally do not enter into such agreements to choose between continuing to do business that way or to change their usual mode of operation to obtain the job. 507 U.S. at 231. Thus, the Seventh Circuit's conclusion that the Act is not "market regulation" does not conflict with *Boston Harbor*'s two-step analytical framework.

Rather, it is petitioners' starting and ending premise – that the scope of the NLRA's market participation exception is "limited" and "narrow" (Pet. 7, 14) – that conflicts with *Boston Harbor*, and in several ways. It conflicts with *Boston Harbor*'s recognition of "the basic assumption that Congress did not intend to displace state law." 507 U.S. at 224. It also conflicts with *Boston Harbor's* narrow definition of the NLRA's preemptive scope: "the NLRA was [not] intended to supplant . . . all legitimate state activity that affects labor," and even state "regulation" is preempted only under *Garmon* or *Machinists*. *Id.* at 226-27. Likewise, petitioners' concern that the Seventh Circuit's opinion sounds the death knell for federal labor law (Pet. 8, 14) conflicts with *Boston Harbor*'s recognition that a State's conduct is not necessarily "regulation" even when "influenced by labor considerations." 507 U.S. at 229 (citing *Gould*, 475 U.S. at 291).

In sum, the Seventh Circuit's opinion is consistent with *Boston Harbor*'s analysis and the presumption against preemption. Petitioners' view is not.

B. The Seventh Circuit's Opinion Creates No Conflict With the Fifth Circuit's Opinion in *Cardinal Towing*.

Petitioners also contend that the Seventh Circuit's opinion conflicts with *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686 (5th Cir. 1999), and its progeny in the Second and Ninth Circuits, none of which concern NLRA preemption. Pet. 8-9. By doing so, they imply that the NLRA's has no preemptive effect only when the government is the owner ("proprietor") of the construction project using a PLA and, even then, only if certain specific findings are made. *Ibid.* Not so.

1. To Hold that a Government's PLA Grant Condition Is "Market Regulation" Unless the Government Owns the Construction Project Would Create an Inter-Circuit Conflict.

Petitioners' insistence that the Act's PLA requirement is "market regulation" because Illinois does not own the facility is a semantic error. *Cardinal Towing*, which concerned preemption by a federal motor carrier law that explicitly preempted any "'law, regulation, or other provision having the force and effect of law'" (180 F.3d at 690-91 (quoting 49 U.S.C. § 14501(c)(1)), did not hold that the government regulates unless it is acting as an owner. Rather, the Fifth Circuit broadly defined "proprietary" conduct as "actions taken to serve the government's own needs rather than those of society as a whole." 180 F. 3d at 691. Thus, *Cardinal Towing*'s broad definition of "proprietary" conduct includes all government action that serves the government's own needs. This mirrors the Seventh Circuit's caution that the government's conduct as an owner is merely one way, not the only way, in which its conduct is not "regulation." Pet. App. 3a. As the Fifth Circuit explained, the distinction between the regulatory and non-regulatory conduct is merely "*most readily apparent* when the government purchases goods and services its operations require on the open market." 180 F.3d at 691.

Furthermore, *Cardinal Towing*'s reasoning is identical to that of the Seventh Circuit. There, the Fifth Circuit held that an ordinance directing that non-consensual towing of certain cars from public streets be handled under one contract was not a regulation because its "limited scope . . . decisively foreclose[d] an inference that the City sought to change the tow truck industry as a whole, let alone influence society at large." *Id.* at 694. Likewise, the Seventh Circuit's holding that the Act applies only to construction work at a funded facility means that the statute's limited scope decisively forecloses any inference

that Illinois sought to affect labor relations generally, as the Seventh Circuit explicitly concluded. Pet. App. 3a.

Furthermore, it is petitioners' broad definition of "market regulation," which includes everything except the government's acts as an owner or direct purchaser of goods and services, that directly conflicts with *Cardinal Towing*. It also conflicts with two federal appellate court opinions addressing NLRA preemption that the Seventh Circuit cited but petitioners do not mention: *Building and Constr. Trades Dep't, AFL-CIO v. Allbaugh*, 295 F.3d 28 (D.C. Cir. 2002), *cert. denied*, 537 U.S. 1171 (2003), and *Hotel Employees & Restaurant Employees Union, Local 57 v. Sage Hospitality Resources, LLC*, 390 F.3d 206 (3d Cir. 2004), *cert. denied*, 544 U.S. 1010 (2005). Had the Seventh Circuit adopted petitioners' view, the result would have created an inter-circuit conflict.

In *Allbaugh*, the D.C. Circuit flatly rejected as irrelevant for *Boston Harbor* purposes a purported distinction between the government's actual ownership of a project and its funding for it, characterizing the narrower definition of "proprietary" conduct as "too crabbed." 295 F.3d at 35. In doing so, the court stressed that "the Government unquestionably is the proprietor of its own funds, and when it acts to ensure the most effective use of those funds, it is acting in a proprietary capacity" for *Boston Harbor* purposes. *Ibid.* For similar reasons, the Third Circuit held in *Sage Hospitality* that to condition government financing for a private party's construction project on the use of a labor neutrality agreement was not "market regulation" under *Boston Harbor*. 390 F.3d at 216-18; *see also* Roger C. Hartley, *Preemption's Market Participant Immunity – A Constitutional Interpretation: Implications for Living Wage and Labor Peace Policies*, 5 U. Pa. J. Lab. & Empl. L. 229, 252-55 (2003) (noting that when government participates in real estate or capital markets by conditioning a grant on the use of a PLA, it protects its

investment interests by ensuring that its investment will not be wasted due to labor unrest).

Thus, petitioners' view of *Boston Harbor*'s "market regulation" test is simply wrong. *Boston Harbor* requires courts to determine whether "in placing a labor-related condition upon its award either of a construction contract *or of funds to another entity that will award the construction contract*, the Government 'acts just [as] a private contractor would act, and conditions its purchasing upon the very sort of labor agreement that Congress explicitly authorized and expected frequently to find,' or instead seeks to affect conduct 'unrelated to the employer's performance of contractual obligations to the [Government].'" *Allbaugh*, 295 F.3d at 34-35 (emphasis added) (quoting *Boston Harbor*, 507 U.S. at 231-32); *see also Sage Hospitality*, 390 F.3d. at 216 (defining *Boston Harbor*'s two-step inquiry as asking if (1) "the challenged funding condition serve[s] to advance or preserve the state's proprietary interest in a project or transaction, as an investor, owner, or financier" and (2) "the scope of the funding condition is 'specifically tailored' to the proprietary interest") (citing *Boston Harbor*, 507 U.S. at 232). Significantly, one of petitioners' own authorities found "no significant difference" between the *Boston Harbor* "market regulation" test as articulated in *Cardinal Towing* and *Sage Hospitality*. *Healthcare Ass'n of New York State, Inc. v. Pataki*, 388 F. Supp. 2d 6, 16 (N.D.N.Y. 2005).

In sum, the Seventh Circuit's opinion avoided, not created, an inter-circuit split on the question of whether the government's PLA condition on funding is "market regulation" if it is not the owner of a project.

2. Even if *Boston Harbor* Required Explicit Findings of Analogous Private Conduct and Narrow Scope, the Act's PLA Grant Condition Allows Those Findings.

Petitioners also insist that "numerous decisions in other circuits" have interpreted *Cardinal Towing* and *Boston Harbor* as requiring specific findings of analogous private conduct and narrow scope to avoid NLRA preemption. Pet. 6-8. As support, however, they cite just three cases – one is a district court ruling currently on appeal, and neither of the other two is an NLRA preemption case. *Ibid.* (citing *Healthcare Ass'n*, 388 F. Supp. 2d 6 (N.D.N.Y. 2005); *Olympic Pipe Line Co. v. City of Seattle*, 437 F.3d 872, 881-82 (9th Cir. 2006); and *Sprint Spectrum L. P. v. Mills*, 283 F.3d 404, 416-21 (2d Cir. 2002)).

Petitioners imply that the Seventh Circuit did not find that the PLA required as a grant condition under the Act is analogous to the conduct of a private party (Pet. 3, 8-9, 10), yet the Seventh Circuit made this finding (Pet. App. 2a). They also insist that the Seventh Circuit could not make this finding, stating that a grantee is not an "employer in the construction industry" under Section 8 of the NLRA and thus cannot use a PLA. Pet. 9, 10. As support, they merely cite (without explanation) an NLRB determination that an operator of a chain of retail stores that was a prospective lessee was not an "employer in the construction industry." Pet. 10 (citing *Columbus Bldg. & Constr. Trades Council (Kroger Co.)*, 149 N.L.R.B. 1224 (1964)). To the extent that petitioners narrowly define "employer in the construction industry" to mean only an owner, that view appears to conflict with the "rather expansive definition" found in more recent NLRB rulings. *Milwaukee and Southeast Wisconsin Dist. Council of Carpenters v. Rowley-Schlimgen, Inc.*, 2 F.3d 765, 767-68 (7th Cir. 1993) (citing *Los Angeles Bldg. and Constr. Trades Council (Church's Fried Chicken)*, 183 NLRB 1032, 1036 (1970), and

United Bhd. of Carpenters and Joiners of America (Longs Drug Stores, Inc.), 278 N.L.R.B. 440, 1986 WL 54111 (1986)). Under this more expansive definition, an "employer in the construction industry" is anyone who is able to determine the nature of the workers who will be employed at a construction site. *Id.* at 769. Nothing in the record here indicates that a grantee would not be able to choose who will construct its facility.

Likewise, the Seventh Circuit's ruling is consistent with the second part of the *Boston Harbor* test: the court held that Illinois does not seek to affect labor relations generally. Pet. App. 3a. This means that the Act does not affect conduct unrelated to the State's articulated interests in ensuring the efficient, effective use of its funds by requiring skilled workers, predictable costs, and labor peace. The court supported its conclusion by emphasizing the Act's limited scope: any owner that does not want to use a PLA need not seek a grant, and even if labor and management give up the right not to deal with organized labor to work on a grantee's facility, they still remain free to make independent decisions with respect to all other construction projects. Pet. App. 3a, 5a. Contrary to petitioners' characterization of the Act as a "mandate" that "forces" unwilling parties to use a PLA (Pet. 3), the Act allows owners, labor, and management to retain their right to avoid unions elsewhere. As the Seventh Circuit explained, it is merely an incentive to surrender that right voluntarily, as a condition of receiving state funds for a particular project. Pet. App. 5a.

Furthermore, neither *Olympic Pipe Line* nor *Sprint Spectrum* conflicts with the Seventh Circuit's opinion here. In *Olympic Pipe Line*, the Ninth Circuit merely held that the city's imposition of pipeline safety conditions was preempted by a federal pipeline safety statute because (1) the city owned the streets and the land beneath them as a sovereign, so its interest was not that of a private market participant that owns a pipeline

or competes in a pipeline market or related market; (2) the city acted pursuant to its regulatory, police power and its general duty to protect the public health and safety rather than in an attempt to protect its role in the real estate market; and (3) the city's executives had explicitly invoked police and regulatory powers when doing so. 437 F.3d 881-82. By contrast, for Illinois to offer a conditional grant is neither unique to sovereigns nor an exercise of the State's regulatory, police power pursuant to its general duty to protect public health and safety, and Illinois never explicitly (or implicitly) invoked its police or regulatory powers when it enacted the Act. Likewise, in *Sprint Spectrum*, the Second Circuit rejected a Telecommunications Act preemption challenge to a school district's lease condition, noting that a private landlord could impose that condition (283 F.3d at 416-21), just as a private employer in the construction industry may use a PLA. *Sprint Spectrum* thus does not conflict with the Seventh Circuit's ruling.

In sum, the Seventh Circuit's opinion is fully consistent with *Boston Harbor*'s two-part test for NLRA preemption. As the Seventh Circuit correctly held (and *Allbaugh* and *Sage Hospitality* agree), ownership is one, but only one, of the government interests relevant to the NLRA's "market participant" exception.

C. The Seventh Circuit's Opinion Creates No Conflict With *Gould* Concerning the Government's Use of Its Spending Power as a Pretext for Regulation.

Petitioners state, without elaboration, that the Seventh Circuit's opinion conflicts with the rule that the government's spending power cannot be used as a pretext for regulating labor relations. Pet. 8 (citing *Gould* and *Boston Harbor*). There is no conflict.

Gould held that Wisconsin's statutory ban against doing business with vendors who had repeatedly violated the NLRA conflicted with the NLRA's "integrated scheme of regulation" for labor law violations and thus was preempted under *Garmon*. 475 U.S. at 287- 89 & n.5. In so holding, the court rejected Wisconsin's argument that the ban was an exercise of spending power, not regulatory or police power, citing the ban's punitive effect and Wisconsin's admission that the statute's intent was to deter violation of the NLRA and to encourage compliance therewith. *Ibid.* *Gould* has no relevance here. The Act is not a ban, and it neither deters violations of the NLRA nor encourages compliance with it. Instead, as the Seventh Circuit held, the Act is not a "market regulation" because owners, labor, and management remain free to do as they like with regard to all activities other than construction on a grantee's facility.

Thus, the Seventh Circuit's opinion creates no conflict with the rule that the government may not use its spending power as a pretext for regulation. In fact, to have adopted petitioners' narrow view of the government spending power might have created a conflict with *Colfax Corp. v. Illinois State Toll Hwy. Auth.*, 79 F.3d 631 (7th Cir. 1996), in which the Seventh Circuit upheld a PLA requirement with a far broader scope – it covered *all* other facilities on which a contractor worked as a condition for working on a government project.

D. The Seventh Circuit's Rejection of Petitioners' Request for Rehearing En Banc Demonstrates That There Is No Intra-Circuit Conflict About "Market Regulation" for *Boston Harbor* Purposes.

Petitioners also claim that this Court's review is required because the Seventh Circuit's opinion here conflicts with two other Seventh Circuit rulings on NLRA preemption. Pet. 9-11 (citing *Colfax* and *Metropolitan Milwaukee Ass'n of Commerce v. Milwaukee County*, 431 F.3d 277 (7th Cir. 2005)). An intra-

circuit conflict, however, is not a ground for this Court's attention. Sup. Ct. R. 10; *see also*, R. Stern, et al., *Supreme Court Practice*, § 4.6, at 235-36 (8th ed. 2002). Even if it were, petitioners are wrong – there is no intra-circuit conflict, as the Seventh Circuit's rejection of their petition for rehearing en banc (without a single vote in favor) makes plain.

Contrary to petitioners' view, *Colfax* did not concern a "single-project labor agreement requirement." Pet. 11. On the contrary, the Illinois Toll Authority required a contractor to become a party to an existing collective bargaining agreement that would apply to *all* of the contractor's other projects, including those in which the Authority had no interest at all, in order to work on Authority projects. 79 F.3d at 632, 634-35. Despite the broad scope of that condition, the Seventh Circuit held that it was not "market regulation," reasoning that the Authority merely had done what a private entity could do under *Boston Harbor*. *Id.* at 635. Significantly, the Seventh Circuit held that the PLA requirement in *Colfax* did not cross *Boston Harbor*'s bright line into "market regulation," even though it affected that contractor's labor relations on all other projects, because it was imposed only on contractors who worked on an Authority project. *Id.* at 634-35. The Seventh Circuit's opinion that the Act's far narrower PLA condition is sufficiently project-specific to avoid a finding of preemption is thus in accord with *Colfax*. Indeed, had the Seventh Circuit held that the Act's narrower PLA condition is a "market regulation," it would have had to overrule *Colfax*.

Similarly, there is no conflict between *Milwaukee County* and the Seventh Circuit opinion here, which explicitly *relied* on it. Pet. App. 4a. At issue in *Milwaukee County* was a county ordinance requiring that any firm with a county contract for certain services provided to county residents had to negotiate a labor peace agreement with any union that wanted to organize employees who worked on such contracts. 431 F.3d at 280.

Among other things, the ordinance required that such agreements contain a prohibition against employer conduct the NLRA protects, which meant that the ordinance unfairly favored union organizing. *Ibid.* After carefully reviewing the record on summary judgment, the Seventh Circuit held that the ordinance was "market regulation" for *Boston Harbor* purposes because the county was trying to substitute its own labor-management philosophy for that of the NLRA. *Id.* at 281. The court found "inescapable" the inference of pretext due to the "mismatch" between the county's ostensible interest in uninterrupted services and the practical effect of the labor peace agreements, which (unlike PLAs) the NLRA does not recognize. *Id.* at 281-82.

Contrary to petitioners' view (Pet. 10), the Act is sufficiently narrow that it has no similarly impermissible "spillover" effect into projects not funded under the Act. As the Seventh Circuit noted here, the ordinance in *Milwaukee County* represented an attempt to supplant the NLRA by prescribing how employers must handle labor relations in all aspects of their business. Pet. App. 4a. By contrast, the Act "is concerned exclusively with how subsidized renewable fuels projects contract for labor," a project-specific condition. *Ibid.* Moreover, the Act's PLA requirement incorporates the NLRA's "tried and true" method for uninterrupted work, unlike the *Milwaukee County*'s labor peace agreement, which the NLRA does not recognize. Under these circumstances, the Seventh Circuit's view that the Act does not evince a desire to substitute the State's labor relations policy views for that of the NLRA does not conflict with *Milwaukee County*.

II. The Seventh Circuit's Mention of Federal Spending Cases Did Not Create a New Test for "Market Regulation" Under the NLRA.

Although petitioners themselves rely on cases that do not concern the NLRA (Pet. 8-9), they fault the Seventh Circuit's

mention of federal spending cases, which (they say) were used to invent "a new and erroneous test" for use of the government's spending power as a pretext for "market regulation" under the NLRA. Pet. 11-15. They are wrong.

The central problem with petitioners' argument is that the Seventh Circuit used *Dole*, *Rust*, and *Finley*, all of which upheld a condition on a federal grant, merely to illustrate its point: the Act's grant condition cannot be "market regulation" under *Boston Harbor* because it applies only to a funded project, just as a condition on federal funding that applies only to funded activities is constitutional. Pet. App. 3a-5a. This reasoning created no new test for NLRA preemption. On the contrary, it is fully consistent with *Boston Harbor*, which upheld the bid specification at issue there in part because it gave contractors a choice between continuing to do business with those who do not require PLAs or changing their usual mode of operation to obtain the work. 507 U.S. at 231.

III. Even if the Act Were "Market Regulation," the Result of This Case Would Be the Same.

Even "market regulation" is not preempted by the NLRA unless it falls with the scope of the *Garmon* or *Machinists* preemption doctrines. *Boston Harbor*, 507 U.S. at 226-27. The Act does neither. Thus, even if the Seventh Circuit erred in holding that the Act is not "market regulation," reversal on that point will make no difference in the outcome here, which is another ground for denying certiorari. *See* Stern, *supra*, §4.4, at 231.

Garmon preemption concerns government acts that interfere with the NLRA's integrated scheme of regulation of management and labor relations as embodied in Sections 7 and 8 of the NLRA. 29 U.S.C. §§ 157, 158 (Pet. App. 18-19a). Thus, it prohibits the government from regulating either the employee activities that Section 7 protects (even arguably) or

the labor practices that Section 8 prohibits (even arguably). 359 U.S. at 246, 244. *Garmon* held that the NLRA preempted a state court from awarding an employer damages for economic injuries when its employees peacefully picketed, on the ground that this state remedy was inconsistent with the NLRA's substantive remedial provisions. *Id.* at 246. In *Gould*, this Court relied on *Garmon* to hold that the NLRA preempted a Wisconsin law disqualifying vendors from doing business with the State for repeated violations of the NLRA, on the ground that the state law was an obvious means to compel compliance with the NLRA, as Wisconsin had admitted. 475 U.S. at 286-87.

Here, petitioners cannot show that the Act regulates activities that are arguably protected by Section 7 or constitute an unfair labor practice under Section 8. They have not identified any Section 7 activity that the Act impairs, and even a cursory reading of that provision reveals that it grants bargaining rights only to employ*ees*. 29 U.S.C. § 157. Thus, the Act cannot possibly violate Section 7 with regard to petitioners, who are employ*ers*. As for Section 8, it explicitly permits an employer in the construction industry to use a PLA. 29 U.S.C. § 158 (Pet. App. 18a-19a). Section 8's allowance of PLAs in the construction industry does not make this practice "protected" for *Garmon* purposes. *United Auto Workers v. Chao*, 325 F.3d 360, 363-64 (D.C. Cir. 2003), *cert. denied*, 541 U.S. 987 (2004). Accordingly, even if the Act's grant condition were "market regulation," it would not be preempted under *Garmon*, for it regulates neither employee bargaining rights that Section 7 protects nor labor practices that Section 8 prohibits as unfair.

Likewise, the Act would not be preempted under the *Machinists* doctrine, which prohibits the government from regulating the "self-help economic activities" that Congress intentionally left "to be controlled by the free play of economic

forces." 427 U.S. at 140, 147 (internal quotation marks omitted). Section 8 permits private employers in the construction industry to use PLAs (29 U.S.C. § 158 (Pet. App. 19a)), and as *Boston Harbor* cautioned, to prohibit a government entity from using a PLA if a private party could do so is antithetical to the free market concerns underlying the *Machinists* doctrine. 507 U.S. at 231. Plainly, the Act is not preempted under *Machinists*.

In sum, this Court has narrowly cabined the NRLA's preemptive scope to government *regulation*, and even then, only a regulation that acts within a zone that Congress protected and reserved for the NLRB's primary jurisdiction (*Garmon*) or for complete market freedom from all regulation of labor/ management relations (*Machinists*). The Seventh Circuit's finding that the Act's PLA requirement is not a regulation does not conflict with *Boston Harbor* and federal reviewing court opinions on NLRA preemption – the Act serves, and is tailored to, the State's interest in the efficient and effective use of a relatively small amount of money (at most $15,000,000 annually) for a few construction projects. Even if the Act were a regulation, it does not fall within the narrow scope of either *Garmon* or *Machinists* preemption.

CONCLUSION

The petition for a writ of certiorari should be denied.

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In The Supreme Court of the United States

NORTHERN ILLINOIS CHAPTER OF ASSOCIATED BUILDERS AND CONTRACTORS AND CONTRACTORS, INC. AND LOBERG EXCAVATING, INC.,

Petitioners,

v.

JACK LAVIN, in his official capacity as DIRECTOR OF THE ILLINOIS DEPARTMENT OF COMMERCE AND ECONOMIC OPPOSRTUNITY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONERS' REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 05-1421

IN THE
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NORTHERN ILLINOIS CHAPTER
OF ASSOCIATED BUILDERS AND
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Petitioners

v.

JACK LAVIN, in his official capacity
as DIRECTOR OF THE ILLINOIS
DEPARTMENT OF COMMERCE
AND ECONOMIC OPPORTUNITY

Respondent.

On Petition For Writ Of Certiorari To The
United States Court Of Appeals For The Seventh
Circuit

PETITIONERS' REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondent's Opposition to the Petition misstates the holding of the Seventh Circuit in an unsuccessful effort to obscure the serious conflicts created by the court's erroneous decision. If

anything, the Opposition highlights the confusion engendered by the Seventh Circuit's novel insertion of "federal subsidy" case law into the unrelated field of federal preemption of state labor law. It remains necessary for the Court to grant the Petition in order to reconcile the conflicting interpretations of this Court's *Boston Harbor* decision.

It must be recalled that the Respondent did not argue to the panel below for the preemption standard ultimately adopted by the court of appeals and now advocated by the Opposition. Rather, Illinois earlier contended that its legislature was acting as a proprietor/market participant within the meaning of *Boston Harbor* by enacting a statute that required private owners of renewable fuel plants to enter into labor agreements as a condition of receiving state funding. The Seventh Circuit rejected the State's contention, and the district court's acceptance of it, observing that "the problem with this view is that the state is not the proprietor *of* anything." (App. 2a) (emphasis in original).

The court of appeals declared, however, that rejection of the State's "proprietary" interests did not "resolve the main question." The Seventh Circuit then asked (and answered) *sua sponte* what it considered to be the "main question," though neither party had previously presented it to the court: "Is a condition on the receipt of a grant a form of regulation?" The court answered this question in the negative by relying almost exclusively on this Court's "federal spending" decisions none of which addressed in any manner the *Boston Harbor* decision

or federal preemption of state law generally, let alone state labor law. (App. 3a-5a). [1]

Under these circumstances, the Respondent's Opposition is simply wrong to pretend that "this reasoning created no new test for NLRA preemption." (Opp. At 19). Of course it did. Moreover, as argued in the Petition, the Seventh Circuit's new test conflicts with the interpretations of *Boston Harbor* previously set forth in other court of appeals decisions, including *inter alia* the following:

- Before this case, *Boston Harbor* was understood to be a narrow exception from the general prohibition of state interference with private sector labor law, limited to those circumstances when state agencies "exemplified" market forces by acting in a proprietary fashion, *i.e.*, as project owners procuring construction services in the same manner as private actors. Pet. at 8. Under the Seventh Circuit's ruling, the proprietary limitation apparently no longer applies.

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[1] The Opposition disingenuously refers to the Seventh Circuit's exposition on the federal spending cases (taking up more than one-third of the court's opinion) as a mere "mention." (Opp. at 18). Apparently recognizing that little can be said in its favor, the Opposition offers no substantive analysis of the court's treatment of the federal spending doctrine (*Id.* at 19), nor does the Opposition even attempt to explain the apparent inconsistencies in the court's unprecedented application of the federal spending cases to the field of labor law preemption. *See* Pet. at 11-14.

- Before this case, *Boston Harbor* was understood to exempt from federal preemption a project-specific set of labor conditions imposed by a state agency as the owner of the project. Under the Seventh Circuit's ruling, that limitation has been abandoned as well, given that the court has now upheld an across-the-board state statute, applying to many projects and applying to projects in which the state has no ownership role.

- Before this case, *Boston Harbor* was understood to require the analysis described in *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F. 3d 686 (5th Cir. 1999) to distinguish between proprietary and regulatory activity.[2] The Seventh Circuit's ruling has ignored and plainly departed from the *Cardinal Towing* analysis.

- Before this case, pursuant to the *Cardinal Towing* test, *Boston Harbor* was understood to require that a challenged state action essentially reflect the entity's own interest in its efficient procurement of needed goods and services. But the Seventh Circuit found no state procurement interest here at all (other than to "shower benefits" on union supporters).

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[2] *See also Olympic Pipe Line Co. v. City of Seattle*, 437 F. 3d 872, 881 (9th Cir. 2005); *Sprint Spectrum L.P. d/b/a Sprint PCS v. Mills*, 283 F. 3d 404 (2d Cir. 2002); and *Healthcare Ass'n of New York State, Inc. v. Pataki*, 388 F. Supp. 2d 6, 23 (N.D. NY 2005), *appeal pending* (2d Cir.).

- Before this case, under the *Cardinal Towing* test, *Boston Harbor* was understood to require that the proprietary/regulatory interest of a challenged state action be measured by comparison with the typical behavior of private parties in similar circumstances. But the Seventh Circuit made no finding that private parties engage in similar behavior to that of the State in enacting a law conditioning the receipt of state funds on the adoption of labor agreements.[3]

- Before this case, constitutional limits on federal spending were deemed to present "an entirely different question from what States may do with the [NLRA] in place." *Wisconsin Dept. of Ind., Labor and Human Relations v. Gould*, 475 U.S. 282, 290 (1986). But under the Seventh Circuit's ruling, the "main question" in this federal preemption case has become whether a state-imposed condition on the receipt of a grant of state funds comports with this Court's decisions on the constitutional limits on federal spending. (App. 4a).

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[3] As noted in the Petition, private parties who are not "employers in the construction industry" are prohibited by Section 8(e) of the NLRA from requiring other employers to adopt labor agreements, as the State has done here. Pet. at 9. The Opposition does not contest this settled reading of the NLRA's plain language, and unlike the situation in *Boston Harbor*, the Opposition identifies no private actor who would be permitted under the Act to engage in the kind of conduct engaged in here by the State.

- Before this case, *Boston Harbor* was understood not to allow states to use their spending power as a "pretext for regulating labor relations." *See Gould, supra*, 475 U.S. at 287, 291. But the Seventh Circuit's decision expressly authorizes states to "shower benefits" on labor union supporters, thereby interfering with the private balance of labor relations in a manner expressly prohibited by this Court in *Machinists v. Wisconsin Employment Relations Comm'n,* 427 U.S. 132 (1976).

Thus, contrary to the Opposition's efforts to minimize the significance of the Seventh Circuit's decision, it is indisputable that the court of appeals has dramatically departed from previously settled understandings of labor law preemption, thereby creating serious conflicts with decisions of this Court and other courts of appeals. The Petition should be granted so that the Court can resolve these conflicts and restore the rightful balance among employers, employees, unions mandated by the NLRA in all jurisdictions of the country.

The remaining arguments of the Opposition provide no reason to decline review. First, the Opposition contests Petitioners' characterization of the challenged Illinois Renewable Fuels Development Program Act as "broad, general, and fraught with ambiguity." The IRFPDA speaks for itself, and is contained in the Appendix to the Petition. (Pet. App. 13a-17a). Among other facial defects, the Act contains no findings supporting its labor provisions and no limitations on the scope of

the project labor agreements that are mandated by the law.[4]

The Opposition further claims that the Seventh Circuit's decision avoids, rather than creates, a conflict, citing the decisions in *Building and Constr. Trades Dept, Afl-CIO v. Allbaugh*, 295 F. 3d 28 (D.C. Cir. 2002), *cert. denied*, 537 U.S. 1171 (2003), and *Hotel Employees & Restaurant Employees Union, Local 57 v. Sage Hospitality Resources, LLC*, 390 F. 3d 206 (3d Cir. 2004), *cert. denied*, 544 U.S. 1010 (2005). In *Allbaugh*, the D.C. Circuit upheld a Presidential Executive Order that *avoided* interference with private sector labor relations by "neither requiring nor prohibiting" PLAs on federal projects. In *Sage*, the Third Circuit did allow a government agency to impose a PLA requirement, but only after finding that the government was acting in furtherance of its proprietary interests as an investor in the (single) project at issue. Neither case supports the Seventh Circuit's holding, and a finding in favor of preemption by the court of appeals in the present case would have created no conflict whatsoever.

Finally, the Opposition maintains that the State's conditioning of its funds upon employers' adoption of union agreements under the IRFPDA does not fall within the scope of the *Garmon* or *Machinists* preemption doctrines. Opp. at 19-21. In

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[4] The Opposition improperly relies on post-enactment executive pronouncements as remedies for the facial overbreadth and missing legislative findings of the Act. The statute's regulatory purpose can only be judged by the actions and words of the legislature itself.

order to make this claim, the Opposition asserts that petitioners, as employers, cannot invoke the protections of Sections 7 or 8 of the NLRA. This contention is squarely contradicted by this Court's holding in *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103 (1989) (*Golden State II*). There, having found preempted a city's conditioning of a franchise renewal on an employer's settlement of a labor dispute (in *Golden State I*, 475 U.S. 608 (1986), the Court rejected the city's further argument that its conduct did not violate any rights secured by the NLRA to employers, as follows:

> The NLRA...creates rights in labor and management both against one another and against the State.... The rights protected against state interference, moreover, are not limited to those explicitly set forth in section 7 as protected against private interference. The NLRA...has long been understood to protect a range of conduct against state but not private interference.... And, contrary to the city's contention, resort to economic weapons should more peaceful measures not avail is the right of the employer as well as the employee.

Id., 493 U.S. at 109-110 (citations omitted).

The condition imposed by Los Angeles and struck down by this Court in *Golden State Transit* was neither as intrusive nor as broad in its scope as the condition imposed by the state law at issue here. Just as the Court found Los

Angeles to have unlawfully interfered with private sector labor relations in that case, the Seventh Circuit was required to find unlawful interference here. Only by misinterpreting *Boston Harbor,* ignoring *Golden State Transit* and *Cardinal Towing*, and applying the inapposite "federal spending" cases did the Seventh Circuit avoid finding that the IRFPDA was preempted. Contrary to the Opposition, the court of appeals decision conflicts with each of these precedents and raises important constitutional issues that can only be resolved by this Court.

CONCLUSION

For each of the reasons stated above and in the Petition, the Petition for Writ of Certiorari should be granted.

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